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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 5889

JOHN SANTOSKY II and ANNIE SANTOSKY

Petitioners

v.

BERNHARDT S. KRAMER, Commissioner,
Ulster County Department of Social Services,
et al.

Respondent

On Petition for a Writ of Certiorari to
the Supreme Court of the State of New York,
Appellate Division, Third Department

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The relevant opinions which disposed of this case in the New York State Courts are contained in Petitioner's Appendices A, B, and D.

JURISDICTION

The decision of the New York State Court of Appeals was entered on September 16, 1980. The petition for a writ of certiorari was received by the Respondent on December 11, 1980. The jurisdiction of this Court is invoked under 28 USC §1257(3). At issue in this case is the constitutionality of a state statute. Thus, 28 USC §2403(b) may be applicable.

QUESTION PRESENTED

Whether, in a proceeding to terminate parental rights, such rights may be terminated based upon a preponderance of the evidence standard.

STATUTE INVOLVED

The provisions of the New York Family Court Act, Section 622, are attached as Appendix A.

STATEMENT

The petition in this case represents the final stage in a long controversy surrounding the Santosky children. The children, John, Jed, and Tina, have been placed in foster care since 1974. Mr. and Mrs. Santosky have consistently failed to maintain adequate contacts with their children since that time (Pet. App. B-3). Such treatment led one expert to conclude that the relationship between the Santosky's and their children was devoid of any real emotional contact. More importantly, the expert sought to curtail any further contact on the grounds that it was detrimental to the children. Accordingly, the trial court found that (i) the Santosky children regard their natural parents as strangers and (ii) the children viewed parental meetings merely as something to be endured.

The hearing below terminated the parental rights of Mr. and Mrs. Santosky based upon permanent neglect. In its opinion, the Court below considered Respondent's attempts to assist Mr. and Mrs. Santosky keep their children. Aid from the Department consisted of arranging meetings between Petitioner's and their children, educational assistance, psychiatric treatment, and vocational assistance. The aid totaled in excess of $16,000 over a period of three years. The Court noted,

> "In short... ever since the Santosky children have been in foster home placement, the parents have not only had offered, but diligently urged upon them every social service available in Ulster County which could conceivably have helped the Santosky's in achieving a goal of eventual reunion of the family." (Pet. App. B-21).

In spite of these efforts, the Court found that Mr. and Mrs. Santosky's parental ability and skill was non-existent, and terminated the parental rights accordingly (Pet. App. B-22).

From that juncture, the case was brought through the Appellate system of the New York State Courts. The sole question in any of the appellate proceedings was whether a preponderance of the evidence standard was constitutional. The Appellate Division of the Supreme Court of New York held that such a standard was proper (Pet. App. A-1). The New York State Court of Appeals, in turn, affirmed the holding of the lower appellate court (Pet. App. D-1).

ARGUMENT

Respondent's position is grounded upon four basic assertions. First, the evidentiary standard governing termination of parental rights is an issue which lies within the sound discretion of the individual state legislatures. It does not invoke constitutional considerations which warrant review. Thus, where the legislature has spoken, as it did in the instant case, that decision should not be overturned by the judiciary. Secondly, the standard of proof chosen by the New York State legislature is legally correct. Third, assuming arguendo that the issue is reviewable, it is already before this Court in Doe v. Delaware, Docket No. 79-5932. As the issue turns on purely legal considerations, granting this petition, and its accompanying set of facts, will not aid in the disposition of the question. Finally, the decision below should be allowed to stand as it is factually correct.

A. The question raised by the petition does not present a substantial federal question.

Petitioners correctly cite several major cases for the proposition that freedom of personal choice in matters of family life is one of the liberties protected by the due process clause of the fourteenth amendment. E.g., Cleveland Board of Education v. La Fleur, 434 U.S. 246, 255 (1978). Petitioners have further

cited cases in which the Court has held that a preponderance of the evidence standard did not satisfy due process requirements where utilized in certain adjudicatory settings. In re Winship, 397 U.S. 358 (1970) (juvenile delinquency proceeding); Addington v. Texas, 441 U.S. 418 (1979) (civil commitment proceeding). Nonetheless, it does not follow that the Court should review the standard of proof necessary to terminate parental rights by reason of the permanent neglect of the parents' children pursuant to the New York Family Court Act, Art. 6.

As noted by Justice Harlan concurring in Winship, "the choice of the standard to be applied in a particular kind of litigation should...reflect an assessment of the comparative social disutility of each." 397 U.S. at 371. The due process clause dictates, therefore, that a juvenile delinquency adjudication must be determined by proof beyond a reasonable doubt in a society where it is far worse to convict an innocent man than to let a guilty man go free. Winship, 397 U.S. at 372 (J. Harlan concurring). By analogy, a state's choice of a standard of proof in a proceeding to terminate parental rights is an assessment of whether it is far worse to terminate the rights of a worthy parent than to risk further harm to a permanently neglected child. But unlike the standard of proof in a criminal case which is firmly grounded in fundamental values of American jurisprudence, one cannot compare the social disutility of these two erroneous outcomes and come to a fundamental value determination that erroneous reverance of parental rights have a greater social disutility than erroneous failure to sever. Hernandez v. Arizona, 23 Ariz. App. 32, 530 P.2d 389, 393 (1975).

Simply stated, the values that should be embodied by a standard of proof in a termination of parental rights proceeding, are not a matter of general principles of due process. Rather, such values represent an important determination of state public policy which result from a consideration of the relative interests

of parent and child.

It is the state legislature, and not the judiciary, which is in the best position to set such policy. Cf Huey v. Lente 85 N.M. 585, 592, 514 P.2d 1081, 1088, aff'd 85 N.M. 597, 514 P.2d, 1093 (1973). (J. Hernandez concurring) (court will set standard where no express indication that legislature intended a different result).

B. The decision below is not in conflict with twenty-two state appellate courts and two federal courts as stated by petitioners.

In many of the state cases cited by petitioners, the appeals court was confronted by a termination statute that did not delineate the standard of proof. In such cases the court set out a standard based not upon due process grounds but rather upon state precedent and a weighing of the relative interests of parent and child. E.g., Matter of Adoption of J.S.R., 374 A.2d 860, 864 (D.C. 1977) (high standard of proof is warranted although not constitutionally mandated); In re Sego, 82 Wash. 2d 736, 513 P.2d 831 (1973). The courts in these cases, therefore, were required to set public policy because of legislative inaction.

In contrast to those cases, and the Delaware statute in Doe, the New York legislature has made a public policy determination concerning the comparative rights of parent and child in a termination hearing. Accordingly, further action on the part of the New York courts was not necessary.

Additionally, petitioners have been disingenuous in their characterization of several state and federal cases. In Alsager v. District Court, 545 F.2d 1137 (8th Cir. 1976) (Per Curium), the court succinctly upheld the district court without reaching the issue of the appropriate standard of proof. In re Kelly, 262 N.W. 2d 781 (Iowa 1978) did not involve a raising of the necessary standard of proof. The court merely found that the trial court had failed to apply a "clear and convincing" test as expressly required by the relevant Iowa statute. Finally,

it should be noted that contrary to petitioner's implication, Arizona has not raised the standard of proof in termination hearings. The relevant statute provides for proof by a preponderance of the evidence and this statute has not been disturbed by Arizona courts. Hernandez v. Arizona, 23 Ariz. App. 32, 530 P.2d 389, 393 (1975).

C. The New York termination statute salutes due process requirements.

Even assuming arguendo that this Court rather than the New York Legislature is the appropriate forum for placing a value upon the relative rights of parent and child in a termination hearing, the result of the instant case would not be altered. It is ironic that petitioners discuss in great detail the Court's discussion of the due process rights of juveniles in Winship; yet they fail to mention the rights of juveniles in a parental termination proceeding.

However, any due process analysis must consider the private interests which will be affected. See Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Thus, Petitioners' due process rights become attenuated when opposed by the interests of their children. See Smith v. Organization of Foster Families, 431 U.S. 816 (1977). In the instant case, the rights of the parent cannot be said to overcome the right of a neglected child to be severed from a relationship with an unfit parent. Furthermore, the state has the right and duty to protect infants who are unable to protect themselves, Ginsberg v. New York, 390 U.S. 629 (1968), and to compel parents and children alike to act in ways beneficial to society. See Kleinfield, The Balance of Power Among Infants, Their Parents and The State, 4 Fam. L.Q. 320 (1970). Accordingly, the due process rights of the petitioners have not been violated.

D. The Petition should not be granted as this question is already before the Court.

Assuming arguendo that this Court finds the issue to be of constitutional significance mandating review, this Petition still should not be granted. As Petitioner notes, the same question presented here is already at issue in Doe v. Delaware Docket No. 79-5932.[1] Obviously, the issue raised is strictly legal. As such, it does not turn on the individual facts and circumstances of Petitioner's case or any other for that matter. Therefore, scheduling this case for briefs and oral argument would confer no benefit upon the Court, but it would be of great hardship to the Respondent. Holding this Petition until Doe is decided would not prejudice Petitioner's case. See the result reached in Vanderlaan v. Vanderlaan 405 U.S. 1051 (1972) based upon the decision of Stanley v. Illinois 405 U.S. 645 (1972).

E. The decision below should be allowed to stand as it is correct on the facts.

Furthermore, Respondent urges that this case is not appropriate for review as the decision is factually correct. After several years of assistance, Petitioner's are still incapable of adequately raising children. Far more importantly, John, Jed and Tina have been in foster care for over six years and are awaiting adoption. They now regard their natural parents as strangers. The decision, permanently terminating parental rights, places the children and the Petitioner as strangers in the eyes of the law. Thus, the law now conforms, as it should, to the children's deepseated feelings and beliefs.

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[1] There should be no question that the issue is already before the Court in Doe. The validity of the preponderance of the evidence standard was brought to the attention of the Delaware Courts. It was squarely upheld in the face of a claim that it is unconstitutional. Thus, the preponderance of the evidence standard was ruled on below in the Delaware state courts. See Douglas v. Alabama 380 U.S. 415, 422 (1965) and Toliver v. Wyrick 469 F. Supp. 583, 600 (W.D. Mo. 1979).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

§ 615. Repealed. L.1976, c. 666, § 15, eff. Jan. 1, 1977

Section, which related to person who may originate proceedings, was added L.1962, c. 686; amended L. 1973, c. 804, § 6. The subject matter is now covered by Social Services Law § 384-b.

§ 616. Issuance of summons

On the filing of a petition under this part, the court may cause a copy of the petition and a summons to be issued, requiring the parent to show cause why the court should not enter an order committing the guardianship and custody of the child to the petitioner for the reason that the child is permanently neglected.
As amended L.1976, c. 666, § 17.

1976 Amendment. L.1976, c. 666, § 17, eff. Jan. 1, 1977, provided for order committing guardianship and custody to the petitioner in place of an order depriving parent of all rights of custody and awarding custody to petitioner.

Effective Date of 1976 Amendment; Accrued Rights and Interests. See "Effective Date; Accrued Rights and Interests" note under Social Services Law § 384-b.

§ 617. Service of summons

[See main volume for text of (a) and (b)]

(c) Personal service within or without the state or in a foreign country shall be made in accordance with the provisions of section three hundred seven of the surrogate's court procedure act, as the same may be amended from time to time, with respect to service of a citation.

(d) Service of the petition and other process by publication shall be made in accordance with the provisions of CPLR 316, provided, however, that a single publication in only one newspaper designated in the order shall be sufficient.

As amended L.1976, c. 666, §§ 18, 19.

1976 Amendment. Subd. (c). L. 1976, c. 666, § 18, eff. Jan. 1, 1977, omitted provisions relating to service by publication.

Subd. (d). L.1976, c. 666, § 19, eff. Jan. 1, 1977, added subd. (d).

Effective Date of 1976 Amendment; Accrued Rights and Interests. See "Effective Date; Accrued Rights and Interests" note under Social Services Law § 384-b.

§ 622. Definition of "fact-finding hearing"

When used in this part, "fact-finding hearing" means in the case of a petition for the commitment of the guardianship and custody of a child, a hearing to determine whether the allegations required by paragraphs (a), (b), (c), and (d) of subdivision one of section six hundred fourteen are supported by a fair preponderance of the evidence.
As amended L.1976, c. 666, § 20.

1976 Amendment. L.1976, c. 666, § 20, eff. Jan. 1, 1977, denominated proceeding as petition for the commitment of the guardianship and custody of a child in lieu of petition permanently to terminate custody.

Effective Date of 1976 Amendment; Accrued Rights and Interests. See "Effective Date; Accrued Rights and Interests" note under Social Services Law § 384-b.

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1. Constitutionality

This section and sections 611, 614 dealing with infants who are permanently neglected were not unconstitutional in failing to define conduct of